

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

STATE OF NEW MEXICO, *ex rel.* NEW
MEXICO SOCIETY FOR ACUPUNCTURE
AND ASIAN MEDICINE,

Plaintiff,

No.

v.

KINETACORE HOLDINGS, LLC, EDO
ZYLSTRA, KERI MAYWHORT, JOHN
AND JANE DOES,

Defendants.

**DEFENDANTS KINETACORE HOLDINGS, LLC, EDO ZYLSTRA AND
KERI MAYWHORT'S NOTICE OF REMOVAL OF CIVIL ACTION PURSUANT TO
28 U.S.C. §§ 1332, 1441, AND 1446**

**TO THE JUDGES AND CLERK OF THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW MEXICO:**

PLEASE TAKE NOTICE that Defendants Kinetacore Holdings, LLC, Dr. Edo Zylstra, and Dr. Keri Maywhort (collectively "Defendants") hereby remove this civil action from the Second Judicial District Court, County of Bernalillo, State of New Mexico, to the United States District Court for the District of New Mexico. Defendants' removal is based upon 28 U.S.C. §§ 1332(a) and 1441 because there is complete diversity of citizenship between Plaintiff New Mexico Society for Acupuncture and Asian Medicine ("Plaintiff" or "NMSAAM"), on the one hand, and each and every Defendant on the other, and the matter in controversy exceeds the sum of \$75,000, exclusive of interests and costs.

In support of this Notice of Removal, Defendants further state:

1. On February 10, 2017, Plaintiff filed its Complaint for Injunctive Relief in the Second Judicial District, County of Bernalillo, State of New Mexico (the “State Court”). A true and correct copy of the Complaint is attached hereto as Exhibit “A.” The Complaint is styled *State of New Mexico ex rel. New Mexico Society for Acupuncture and Asian Medicine v. Kinetacore Holdings, LLC, Edo Zylstra, Keri Maywhort, John and Jane Does*, and bears case number D-202-CV02017-00942. The Complaint alleges a single claim for relief – “Count I – Practice of medicine without a valid medical license.” The Complaint seeks an injunction barring Defendants from performing or instructing others regarding a physical therapy practice known as “Functional Dry Needling” at a conference to be held on the campus of the University of New Mexico in Albuquerque on February 25 and 26, 2017, and at any time thereafter anywhere in the State of New Mexico. Plaintiff alleges that instruction or performance of Functional Dry Needling violates the New Mexico Medical Practice Act and the New Mexico Physical Therapy Act.

2. Plaintiff filed a Motion for Temporary Restraining Order and Preliminary Injunction with the State Court on February 13, 2017. The Motion is scheduled to be heard before the State Court on February 23, 2017. True and correct copies of the Motion papers, the Request for Hearing, the Notice of Hearing on the Motion and other papers filed with the Court are attached hereto as Exhibit “B.” Exhibits A and B compromise all of the documents ultimately served on Defendants and filed in the State Court.

3. Defendants were served with the Complaint, Motion papers, and Notice of Hearing via personal service on February 15, 2017.

4. Based on the allegations of the Complaint, Defendants are informed and believe that Plaintiff is and was at the time of the filing of this action and of this Notice of Removal, a

New Mexico non-profit corporation, with its principal place of business in Albuquerque, New Mexico. [Complaint, ¶¶ 1, 26]

5. At the time of the filing of this action and this Notice of Removal, defendant Kinetacore Holdings LLC, is and was a limited liability company organized under the laws of the Commonwealth of Kentucky, with its principal place of business in Louisville, Kentucky. The members of Kinetacore Holdings, LLC are: (1) Defendant Dr. Edo Zylstra, an individual whose citizenship and place of residence is the State of Michigan; and (2) Evidence in Motion, LLC, a Kentucky limited liability company with its principal place of business in Louisville, Kentucky. The citizenship of a limited liability company is determined by the citizenship of its members. *See Siloam Springs Hotel, LLC v. Century Surety Company*, 781 F.3d 1233, 1238 (10th Cir. 2015).

6. At the time of the filing of this action, and this Notice of Removal, Defendant Dr. Maywhort was and is a citizen and resident of the State of Colorado.

7. Pursuant to 28 U.S.C. § 1441(b)(2), diversity suits are removable if none “of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” Here, none of the named Defendants is a citizen of the State of New Mexico.

8. For purposes of determining diversity jurisdiction and removability of this action, the citizenship of the John and Jane Doe defendants “shall be disregarded.” 28 U.S.C. § 1441(b)(1).

9. The amount in controversy in this action is in excess of \$75,000, exclusive of interests and costs. The Tenth Circuit follows what has commonly been referred to as the “either viewpoint rule” which considers either the value to the plaintiff or the cost to defendant of injunctive and declaratory relief as the measure of the amount in controversy for purposes of

meeting the jurisdictional minimum for diversity. *See Justice v. Atchison, Topeka and Santa Fe Ry. Co.*, 927 F.2d 503, 505 (10th Cir. 1991). Plaintiff seeks to permanently enjoin instruction regarding functional dry needling, and the performance of functional dry needling throughout the State of New Mexico. The financial impact of this proposed injunction on Defendants alone is in excess of \$75,000, based solely on the number of attendees at Defendants' instructional course in February (30 persons), at a cost of \$1,250 per attendee, as well as the cost of developing the educational program (in excess of \$46,000), and the costs of travel for instructors (in excess of \$4,000). Further, there are over 6,000 licensed physical therapists in the State of New Mexico. *See* <http://verification.rld.state.nm.us/>. The procedure is on average performed at a cost of \$200 per hour. The economic impact of barring a whole professional of persons throughout the State from performing a procedure which has been lawfully performed in the State since at least the year 2000 therefore runs, at a minimum, into the hundreds of thousands of dollars. *See* <http://kc.evidenceinmotion.com/wp-content/uploads/sites/5/2016/08/New-Mexico-Acceptance-Letter.pdf> (2000 letter from New Mexico Physical Therapy Board stating that "The PT Act does not prohibit dry needling.") .

10. This, therefore, is a civil action of which this Court has original jurisdiction under 28 U.S.C. § 1332(a), and is one that may be removed to this Court by Defendants pursuant to 28 U.S.C. §§ 1441 and 1446, in that there is complete diversity of citizenship between Plaintiff on the one hand, and Defendants on the other, and the matter in controversy exceeds the sum of \$75,000, exclusive of interests and costs.

11. Furthermore, this Notice of Removal is timely pursuant to 28 U.S.C. § 1446(b) in that the Notice of Removal is filed within 30 days of service of the Summons and Complaint on Defendants on February 15, 2017.

12. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being filed with the State Court, and served upon the Plaintiff.

WHEREFORE, Defendants hereby remove this action from the State Court to the United States District Court for the District of New Mexico, and request that this Court exercise jurisdiction over all further proceedings in this action.

Respectfully Submitted,

HOLLAND & HART LLP

By: /s/ John C. Anderson
John C. Anderson
Julia Broggi
110 North Guadalupe, Suite 1 (87501)
P.O. Box 2208
Santa Fe, NM 87504
Tel: (505) 988-4421
Email: JCAnderson@hollandhart.com
JBroggi@hollandhart.com

- and -

Matthew C. Elstein
Lorrie A. Walker
Selman Breitman LLP
11766 Wilshire Blvd., Suite 600
Los Angeles, CA 90025
Tel: (310) 445-0800
Email: MElstein@selmanlaw.com
LWalker@selmanlaw.com

**ATTORNEYS FOR DEFENDANTS KINETACORE
HOLDINGS, LLC, EDO ZYLSTRA, AND KERI
MAYWHORT**

CERTIFICATE OF SERVICE

The undersigned certifies that on February 21, 2017, the foregoing was served by email on the following:

Deborah E. Mann
Montgomery & Andrews, P.A.
100 Sun Ave. NE Ste 400
Albuquerque NM 87109
Tel: (505) 884-4200
Email: dmann@montand.com

- and -

Brent Foster
1767 12th St. # 248
Hood River, OR 97031
Tel: (541) 380-1334
Email: foster.brent@ymail.com

Attorneys for Plaintiff

By: John C. Anderson
John C. Anderson

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